Khairy Jamaluddin Abu Bakar v Dato' Seri Anwar bin Ibrahim

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)-1041 OF 2011
ZALEHA ZAHARI, CLEMENT SKINNER AND AZIAH ALI JJCA
31 JULY 2012

Civil Procedure — Amendment — Leave to amend statement of claim — Plaintiff applied to amend statements uttered by defendant in defamation action — Initial pleading of defamatory words based on newspaper article of defendant's speech at political gathering — Actual words spoken by defendant discovered when parties exchanged documents during discovery process — Whether application bona fide and brought out real issues for determination — Whether defendant prejudiced if amendment allowed

In his defamation suit against the appellant/defendant, the respondent/plaintiff had pleaded the defamatory words alleged to have been spoken of him by the appellant based on a newspaper report of a speech made by the appellant at an UMNO Youth gathering. The respondent later applied to amend the defamatory words in the statement of claim on the ground the actual words spoken by the appellant only came to light when documents were exchanged at the discovery stage of the proceedings. The senior assistant registrar allowed the amendment. The judge upheld the decision holding the amendment did not result in a change in the plaintiff's cause of action or in the character of the suit; that the amendment was bona fide and that no injustice or prejudice had been caused to the appellant who had, in any case, replied to the amendments in his defence. In his appeal to the Court of Appeal the appellant contended that the amendment should not have been allowed as it introduced another cause of action in slander which did not arise from the same facts; that the prejudice suffered by the appellant could not be compensated for by costs and that the amendment would result in delay.

Held, dismissing the appeal with costs and affirming the High Court's decision:

(1) The respondent's claim in the original statement of claim was for slander and the amendment sought to be introduced was in respect of the same incident. The reasons given in the affidavit in support of the proposed amendments warranted the exercise of discretion in the respondent's favour (see para 15).

(2) The amendment was considered necessary upon the respondent being put to notice of the exact words uttered by the appellant. The purpose of

the amendment was to bring the pleadings in line with the exact words uttered by the appellant (see para 14). A

(3) Consideration of whether it would be unjust to grant leave to amend required a balancing of the applying party's need to amend and the prejudice to the opposing party's interest. An application for leave to amend should generally be allowed provided it was bona fide and where the purpose of the amendment would result in the true issues to be determined (see para 13). B

(4) The amendments sought, however, should not in effect turn the suit from one character into a suit of another and inconsistent character. There would be no injustice if it could be compensated by appropriate orders as to costs (see para 15). C

[Bahasa Malaysia summary

Dalam tindakan fitnahnya terhadap perayu/defendan, responden/plaintif memplid bahawa perkataan fitnah yang didakwa diucap oleh perayu berdasarkan laporan suratkhabar mengenai ucapan yang dibuat oleh perayu di perhimpunan belia UMNO. Responden kemudiannya memohon untuk meminda perkataan-perkataan fitnah di dalam pernyataan tuntutan atas alasan bahawa perkataan sebenar yang diucap oleh perayu hanya terdedah apabila dokumen bertukar tangan di peringkat penemuan prosiding. Timbalan kanan pendaftar membenarkan pindaan tersebut. Hakim mengesahkan keputusan dengan memutuskan yang pindaan tersebut tidak menyebabkan pertukaran di dalam kausa tindakan plaintif atau sifat tindakan tersebut; bahawa pindaan tersebut adalah bona fide dan tiada ketidakadilan atau *prejudis* berlaku kepada perayu yang walau bagaimanapun menjawab kepada pindaan-pindaan tersebut di dalam pembelaannya. Dalam rayuannya kepada Mahkamah Rayuan perayu berhujah bahawa pindaan tidak patut dibenarkan kerana ia menyebabkan kausa tindakan yang lain dalam *slander* yang tidak berbangkit daripada fakta yang sama; bahawa prejudis yang dialami oleh perayu tidak dapat dibayar dengan kos dan pindaan akan menyebabkan kelewatan. D E F G

Diputuskan, menolak rayuan dengan kos dan mengesahkan keputusan Mahkamah Tinggi: H

(1) Tuntutan responden di dalam pernyataan tuntutan yang asal adalah untuk *slander* dan pindaan yang dipohon untuk dikemukakan adalah berkaitan insiden yang sama. Alasan-alasan yang diberikan afidavit sokongan pindaan yang dicadangkan mewajarkan pelaksanan budi bicara memihak responden (lihat perenggan 15). I

(2) Pindaan dipertimbangkan sebagai perlu apabila responden diberitahu mengenai perkataan sebenar yang diucapkan oleh perayu. Tujuan pindaan adalah untuk melaraskan pliding dengan perkataan sebenar yang diucapkan oleh perayu (lihat perenggan 14).

(3) Pertimbangan sama ada ia akan menjadi tidak adil untuk memberikan izin untuk meminda memerlukan pengimbangan keperluan pihak yang memohon untuk meminda dan prejudis kepada kepentingan pihak yang membantah. Permohonan untuk izin meminda patut secara umumnya dibenarkan jika ia adalah bona fide dan di mana tujuan pemindaan akan menyebabkan isu sebenar ditentukan (lihat perenggan 13).

(4) Pindaan yang dipohon, walau bagaimanapun tidak sepatutnya mengubah tindakan tersebut daripada satu sifat kepada tindakan yang lain dan sifat yang tidak konsisten. Tidak akan terdapat ketidakadilan jika ia dapat dipampaskan dengan perintah-perintah wajar terhadap kos (lihat perenggan 15).]

Notes

For a case on leave to amend statement of claim, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 614.

Cases referred to

Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213, FC (refd)

Legislation referred to

Rules of the High Court 1980 O 20 r 5(1)

Appeal from: Civil Appeal No 23–93 of 2007 (High Court, Kuala Lumpur)

Mohamed Shafee Abdullah (Sarah Abishegam with him) (Shafee & Co) for the appellant.

Gobind Singh Deo (S Prakash and Hajan Omar with him) (Gobind Singh Deo & Co) for the respondent.

Zaleha Zahari JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the Kuala Lumpur High Court judge dated 18 March 2011 dismissing the appellant's (defendant in the court below) appeal and affirming the senior assistant registrar's (SAR) decision allowing the respondent's (the plaintiff in court below), application to amend his writ and statement of claim.

[2] The alleged defamatory words pleaded by the plaintiff in the original statement of claim dated 7 September 2011 was based on a publication in *The Star* newspaper as it appeared in its publication dated 3 August 2007 of a speech allegedly delivered by the defendant at an UMNO Youth gathering in Kuala Kangsar on 1 August 2007. Paragraphs 4–5 of the original statement of claim alleged that the defendant had said the following:

Anwar is a puppet of the United States and the Jews, thus he must be hounded until there is no more place for him to run.

[3] The text was translated in Bahasa Malaysia as follows:

Anwar adalah boneka Amerika Syarikat dan orang Yahudi — oleh itu beliau mesti diburu sehingga tiada mana-mana lagi tempat beliau dapat melarikan diri.

[4] The defendant was also alleged to have said the following words:

Anwar is a traitor to the Malay cause.

[5] The text was translated in Bahasa Malaysia as follows:

Anwar adalah pengkhianat kepada perjuangan Melayu.

[6] By encl (13) filed on 10 December 2010 the plaintiff applied to amend the words alleged to have been uttered by the defendant in paras 4–5 of to the statement of claim to read as follows:

Adakah kita sanggup memberi laluan kepada Anwar yang menjadi boneka kepada Amerika? Yang menjadi boneka kepada Yahudi?.

[7] The other proposed amendments to other paragraphs in the statement of claim were consequential to the amendments made in these two paragraphs.

[8] The affidavit filed in support of the application states that the purpose of the amendment was to set out the actual words uttered by the defendant which, according to the plaintiff, only came to light upon the exchange of documents at discovery stage.

THE HIGH COURT DECISION

[9] The learned High Court judge rejected the technical objection that the defendant was prejudiced by the failure to state the precise rule/law upon which the application for amendment was grounded.

[10] The High Court judge was of the view that the proposed amendments did not change the character of the suit into another and inconsistent character. The plaintiff's cause of action was slander before the amendment and remained slander after the amendment. The judge was satisfied that the proposed amendments were made bone fide to enable the true issues in controversy between them and that the amendment would not result in injustice to the

defendant.

THE SUBMISSIONS

[11] The appellant's counsel submitted that the application to amend should have been dismissed for the following reasons. The amendment introduced another cause of action in slander which did not arise from the same facts. The defendant was prejudiced which could not be compensated by costs. The amendment granted would result in delay.

[12] In reply the respondent's counsel submitted that under O 20 r 5(1) the court may allow a party to amend its pleadings at any stage of the proceedings. The alleged defamatory statement of the defendant in the original statement of claim was based on the newspaper report that the plaintiff was a puppet for the Americans and Jews. The exact words uttered by the defendant was only disclosed at discovery stage. The proposed amendment did not change the cause of action. The amendment was to ensure that the pleadings were properly before the court. The defendant was not prejudiced by the said amendment as in his statement of defence the defendant had responded to this allegation.

DECISION

[13] We are of the view the High Court judge had applied the correct principles in exercising his discretion in the manner which he did. Consideration of whether it would be unjust to grant leave to amend required a balancing of the applying party's need to amend, and the prejudice to the opposing party's interest. An application for leave to amend should, in general, be allowed, provided that the application was bona fide and where the purpose of the amendment would result in the true issues to be determined. The amendments sought however should not in effect turn the suit from one character into a suit of another and inconsistent character (see *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 (FC)). There would be no injustice if it can be compensated by appropriate orders as to costs.

[14] In the circumstances of this case the amendment was considered necessary upon the plaintiff being put to notice of the exact words uttered by the defendant. The purpose of the amendment was to bring the pleadings in line with the exact words uttered by the defendant.

[15] The function of the court is clearly to make a decision in accordance with the true facts. The plaintiff's claim in the original statement of claim was for slander, and the amendment sought to be introduced was in respect of the

same incident. We agree with the learned judge that the reasons given in the supporting affidavit for the proposed amendments warrants the exercise of its discretion in the plaintiff's favour.

[16] For the above reasons the appeal was dismissed and the decision of the High Court judge affirmed. The appellant was given liberty to file an amended defence within twenty-one days of this order and the respondent to file a reply within two weeks from service of the amended statement of defence (if any). Costs of this appeal to be costs in the cause. The deposit to the appellant.

Appeal dismissed with costs and the High Court's decision affirmed.

Reported by Ashok Kumar